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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-776

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE
ET AL., APPELLANTS

v.

LT. ROBERT C. BALLARD, U.S.N.
APPELLEE

On Appeal From The United States District Court For
The Southern District Of California

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and orders of the District Court be affirmed or the appeal be dismissed on the grounds that the decision of the District Court is clearly correct under the principles established by this Court in Frontiero v. Richardson, 411 U.S. 677 (1973) and Reed v. Reed, 404 U.S. 71 (1971) and that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

Appellee adds to appellants' statement of the case the following.

This is a direct appeal from a decision of a three judge District Court finding unconstitutional the mandatory discharge provisions of 10 U.S.C. 6382.

The three judge court found that statute to be violative of the due process clause of the Fifth Amendment insofar as that statute directs the involuntary discharge of male U.S. Navy officers prior to the expiration of 13 years of commissioned service while 10 U.S.C. 6401 guarantees 13 years tenure to similarly situated female naval officers. The court found that the legislatively guaranteed tenure time of commissioned service granted to women under section 6401 is an inherently suspect classification and the effect of the tenure provision was to invidiously discriminate against similarly circumstanced male naval officers who are mandatorily discharged before completing 13 years of commissioned service.

The three judge court further found that the provisions of 10 U.S.C. 6382 are "legislative fiscal outlay saving devices for the weeding out of a surplus of U.S.N. officers in a given grade before the vesting of retirement benefits" (Opinion of the three judge court, page 15a of Appendix B of appellants' jurisdictional statement).

The three judge court found on substantial evidence, that appellee Lt. Ballard had served over 17 years in the Navy as an officer and enlisted man; that he had served with overall outstanding fitness reports and had been recommended for promotion in all those fitness reports. The court further found that if he had been allowed to serve 13 years as a Lieutenant, as he would if he were a woman, he would receive retirement benefits of approximately $200,000.00 as opposed to the $15,000.00 severance pay he was to receive under 10 U.S.C. 6382. The statement that Lt. Ballard's performance was only "satisfactory" and that "he was considered to be in the lower 15 percent of eligible lieutenants by two separate selection boards" appearing in the jurisdictional statement at the top of page 4 is not supported by the facts and was not a finding of the court below.

ARGUMENT

The appellants present two arguments why this court should note probable jurisdiction.

1) The three judge court erroneously applied the compelling governmental interest test to the difference in treatment based on sex resulting from the guaranteed tenure provision granted to women under 10 U.S.C. 6401.

2) In any event the differences between 10 U.S.C. 6382 and 6401 are in fact supported by a compelling governmental interest.

A. THE USE OF THE COMPELLING GOVERNMENTAL INTEREST TEST IS PROPER UNDER FRONTIERO V. RICHARDSON, 411 U.S. 677.

The only case law cited by appellants to support their contention that it is not a proper test is Orloff v. Willoughby, 345 U.S. 83, 94 (1953) cited at page 8 of the jurisdictional statement. That case is most inapposite. At the cited page appears the well known statement by Justice Jackson that "orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." Orloff, supra at page 94. Invidious discrimination on the basis of sex is not a legitimate Navy matter nor was it a legitimate Air Force matter in Frontiero v. Richardson, supra. Appellants have cited no authority, therefore, which would preclude the use of the compelling governmental interest test in examining a statute which discrimates on the basis of sex. Frontiero, supra is, of course, ample authority for the application of that test to classifications on the basis of sex and also in the context of classifications on the basis of sex in the Armed Services.

In any event, the three judge court also applied the rational basis test to this case and found it not to have

been satisfied and that is next discussed.

B. THE COURT BELOW FOUND NEITHER A RATIONAL BASIS NOR A COMPELLING GOVERNMENTAL INTEREST TO SUPPORT THE TENURE GRANTED FEMALE AND DENIED MALE NAVAL OFFICERS UNDER 10 U.S.C. 6401 and 10 U.S.C. 6382.

Appellants' jurisdictional statement secondly asserts this Court should note probable jurisdiction since a compelling governmental interest does exist to support the statutory scheme found unconstitutional by the court below (p. 8 of jurisdictional statement). The court below did not limit itself to the compelling interest test but also applied the rational basis test and found no rational basis to support the tenure granted female and denied male naval officers under 10 U.S.C. 6401 and 10 U.S.C. 6382 (p. 18(a) 3rd paragraph of Appendix B of jurisdictional statement).

The jurisdictional statement raises again the issue of rise and fall of national emergencies as it effects the promotion of naval officers causing them to reach the involuntary discharge point at 9 years as opposed to 13 years as was contemplated by Congress when 10 U.S.C. 6382 was enacted (jurisdictional statement at p. 10). The court below spoke clearly to this issue in both its memorandum granting a preliminary injunction and its opinion granting a permanent injunction (p. 15a of jurisdictional statement). If anything, this argument by appellants strengthens Lt. Ballard's case because it shows the legislative intent to

treat male and female officers equally vis à vis involuntary discharge at 13 years of commissioned service for both. This statement at page 10 and footnote 10 of the jurisdictional statement contradicts completely the statement at page 12 of that same jurisdictional statement that the court below gave "males a benefit not intended by Congress." The statute 10 U.S.C. 6382 unconstitutionally fails to incorporate that congressional intent of equality.

The jurisdictional statement points out that Congress is considering equalization of male and female Navy lieutenants by substituting for section 6401 the same provisions which govern male Navy lieutenants in section 6382 (fn. 15 of jurisdictional statement). Once again this strengthens Lt. Ballard's argument that unconstitutional disparate treatment exists and weakens that of appellants' that somehow the Navy must have this disparate treatment to function properly.

Finally, at the end of the jurisdictional statement appears the quote from Frontiero, supra that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members", 411 U.S. at 686-687. One need only substitute male for female in the above quote and it is applicable to Lt. Ballard who, but for

the court below, would have been discharged by the turn of the calendar. Who can contend that this is not an inferior status to a woman Lieutenant who can continue in service for 13 years regardless of times passed over?

CONCLUSION

This Court has recently heard and decided Frontiero v. Richardson, supra, a case dealing with a statutory scheme of fiscal importance to the military involving disparate and discriminatory treatment due to sex. The instant case decided below presents no substantial issues for this Court's consideration and follows Frontiero, supra. That this case finds the male to have been discriminated against is not a sufficient reason to note probable jurisdiction as illustrated by this Court's denial of a hearing in Diaz v. Pan American World Airways Inc., 442 F.2d 385, cert. denied at 404 U.S. 950 (sex discrimination to prevent male from being airline steward), and more recently in Moritz v. Commissioner, 469 F.2d 466, cert. denied at 41 L.W. 3616 (denial of due process to give income tax deduction to single woman caring for invalid mother while withholding same from similarly circumstanced single man).

It is respectfully submitted that the appellants present no substantial questions for the decision of this Court and that the judgment and orders of the District Court should be affirmed or the appeal should be dismissed.

Respectfully submitted,

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